Petition

81-604

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ALEXANDER L. STEVAS,
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1981

LEONARD JOSEPH CAMPAGNO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

BRUCE L. RANDALL
4901 N. Federal Highway
Suite 480
Fort Lauderdale, Florida 33308
Attorney for Petitioner

Of Counsel:
YALE T. FREEMAN
200 S.E. First Street
Suite 1101
Miami, Florida 33131

QUESTION PRESENTED

1.

Is Florida Statute 847.014, Minors participating in harmful motion pictures, exhibitions, shows, presentations or representations, patently unconstitutional because it omits the constitutional requirement that a child's performance be obscene thus impermissibly chilling the dissemination of press material protected under the First and Fourteenth Amendments to the Constitution of the United States and further void for vagueness and overbreath for failing to conform to the minimum standards set forth by this Court in *Miller v. California*, 423 U.S. 15 (1973)?

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1981

LEONARD JOSEPH CAMPAGNO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the per curiam judgment of the Fourth District Court of Appeals of the State of Florida, in which no opinion was published of July 1, 1981. (Appendix A). A timely Petition For Rehearing was filed and denied without comment on July 29, 1981. (Appendix B).

Pursuant to Rule 9.030 of the Florida Rules of Appellate Procedure, the Supreme Court of the State of Florida lacks jurisdiction to consider questions of Appeal where, as here, a Florida Court of Appeals has rendered a per curiam decision, without opinion. The Fourth District Court of Appeals of Florida is therefore the highest state court of last resort in this case within the State appellate system.

OPINION BELOW

The Per Curiam Order of the Court and the minute entry denying the Petitioner For Rehearing are, as earlier indicated, attached hereto as Exhibits A and B.

JURISDICTION

The Per Curiam Order of the Fourth District Court of Appeals was entered on July 1, 1981 and the minute entry denying the Petition For Rehearing was rendered on July 29, 1981. Rule 9.030 of the Florida Rules of Appellate Procedure, under the circumstances of a per curiam decision without opinion, makes this the court of last resort in the State appellate system. The Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as Florida Statute 847.014 are set forth in Appendix C herein.

STATEMENT

Petitioner, a commercial photographer, was convicted following a trial in the Circuit Court In And For Broward County, Florida. Petitioner was sentenced immediately on Counts 1 and 2, minors participating in harmful exhibitions, to the maximum sentence of incarceration of fifteen years per count, said counts to run concurrent. Petitioner was also sentenced as to count 3, contributing to the delinquency of a minor, a misdemeanor count, to one year incarceration, said sentence likewise to be concurrent with that sentence in counts 1 and 2. In short, Petitioner was charged with using a minor, a girl seventeen and one-half, in a photo spread. Said girl representing her age to have been 18 years old.

Pre-Trial Motions To Dismiss on the grounds of the unconstitutionality of the statute were made and denied.

Petitioner upon conviction and sentence was incarcerated for a period of five months and was subsequently released on bond by the Circuit Court In And For Broward County, Florida pending his appeal to the Fourth District Court Of Appeal. After the opinion rendered by the Fourth District Court Of Appeal the Defendant has been ordered to return to incarceration commencing October 12, 1981, barring any Order from this Court.

After the sentencing, as aforesaid, relevant appeals were filed and have now been denied by the Court in a Per Curiam Order without opinion. It is from this Per Curiam Order affirming the Judgment as against the Petitioner for which review is sought by this Petition.

REASONS FOR GRANTING WRIT

FLORIDA STATUTES 847.014, IS PATENTLY UNCONSTITUTIONAL BECAUSE IT OMITS THE CONSTITUTIONAL REQUIREMENT THAT A CHILD'S PERFORMANCE BE OBSCENE THUS IMPERMISSIBLY CHILLING THE DISSEMINATION OF PRESS MATERIAL PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND IS FURTHER VOID FOR VAGUENESS AND OVERBREATH FOR FAILING TO CONFORM TO THE MINIMUM STANDARDS SET FORTH BY THIS COURT IN *MILLER V. CALIFORNIA*, 423 U.S. 15 (1973).

This case offers this Court an opportunity to look within Florida's latest, but misconceived, attempt to regulate visual material dealing with young people engaged in various forms of sex. Although emotionalism and public concern over the exploitation of children creates a hysteria, a common theme and purpose of this Court's opinion must not be lost in such a fervor. The attention of this Court cannot be diverted from the central issue of this case—whether the Florida Legislature, through their enactment of Florida Statute 847.014, flagrantly ignored the First Amendment.

Leonard Campagno herein was charged with two sections of Florida Statute 847.014 which reads as follows:

> (2)(a)(1). It is unlawful for any person knowingly to produce, conduct, direct, perform, or participate in any photograph, motion picture, exhibition,

show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a minor.

(2)(a)(2). It is unlawful for any person knowingly to aid, abet, counsel, hire, or otherwise procure a minor to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a minor.

This particular subsection relies upon various definitions or terms set forth earlier in the statute. These terms include:

(c) "Sexual conduct" means acts of masturbation; sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be female, breast or any act or conduct which constitutes the commission of sexual battery or suggests that such crime is being or will be committed.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means the flagellation or torture by or upon a person clad in undergarments, a mask, or a bizarre costume or the condition of being fetterred,

bound, or otherwise physically restrained on the part of one so clothed.

Printed media, books, *pictures*, and motion pictures are forms of pure expression which are entitled to the highest degree of protection. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625 (1931), *Southern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239 (1975). The high degree of protection afforded to all forms of pure expression does not, with a narrow exception, end when the subject matter of the expression deals with human sexuality; and, therefore, such material may not be normally restricted or censored. *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304 (1957). The "narrow" exception occurs when the contents of what would otherwise be protected expression deals with human sexuality in a matter which is "obscene" under the standards established by this Court, the dissemination of production of such material may be punishable. *Ward v. Illinois*, 431 U.S. 767, 97 S.Ct. 2085, 2087 (1977); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973); *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676 (1964).

However, the line between protected expression and obscene material which is subject to restriction must be drawn so as not to unduly infringe protected rights: *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332 (1958).

As noted most recently in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Texas 1978):

> The Court's task is made even more difficult in a case such as this, where the state through its criminal laws seeks to control what it views

as a serious problem created by the exploitation of *minors in the making of pornographic photographs and films.* This is an important matter; accordingly, the Court must and does give strong consideration to the state's interest in enforcing the policy expressed in the statute, and the Court by no means deprecates the state's concern for minors or its attempt to protect them.

At the same time, it is the Court's duty closely to scrutinize any legislation which purports to limit or prohibit free speech or expressive conduct, whether the expression be by means of a book, magazine, photograph, newspaper, pamphlet, or motion picture. In this area, the Court must be vigilant to safeguard legitimate First Amendment rights, even if to do so may in some cases be a distasteful task. (Emphasis added).

In 1973, this Court issued a series of decisions which established a three-part test for determining whether any given material is obscene. The test reads as follows:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v.*

California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973) (citations omitted).

This Court in *Miller* went on to state:

> We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designated to regulate obscene material must be carefully limited. As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. *Miller v. California*, supra, 413 U.S. at 23-24, 93 S.Ct. at 2615.

The Court gave two examples of the type of sexual material that a State could constitutionally regulate, although it should be noted that these were not meant to be exhaustive. See *Ward v. Illinois*, U.S. 767, 97 S.Ct. 2085 (1977);

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or similated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. *Miller v. California*, supra, 413 U.S. at 25, 93 S.Ct. at 2615.

In reviewing the type of sexual material which can be prohibited by a State statute, this body stated in *Miller*:

> Under the holdings announced today, *no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. Miller v. California*, supra, 413 U.S. at 27, 93 S.Ct. at 2616. (Emphasis Added).

Many states have enacted statutes such as that of the State of Florida yet, only the Florida statute has been judicially approved by the State's highest court in *Griffin v. State*, 396 So.2d 152 (Fla. 1981). To the contrary however, the Texas law was declared unconstitutional in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Texas 1978). New York law was found unconstitutional in the *St. Martin's Press, Inc. v. Carey*, 440 Fed.Supp. 1196 (S.D. N.Y. 1977), but the Second Circuit reversed that judgment and dismissed the complaint on the grounds that there was no case or controversy (605 F.2d 41 §1 [2d Cir. 1979]).

The New York statute, however, has been recently challenged and the Court of Appeals of New York in *People v. Ferber*, 52 N.Y. 2d 674, 422 N.E. 2d 523 (Ct. App. 1981), declared said statute unconstitutional on its face as although they had a legitimate interest in protecting the welfare of minors within its border said interest clearly transcended the First Amendment. See also *Sovereign News Company v. Falke*, 448 F.Supp. 306 (N.D. Ohio 1977).

Overwhelming authority throughout the United States leads to the irresistible conclusion that a child

pornography statute to be constitutional must incorporate this Court's definition of obscenity.

Without the "obscenity" control factor, Florida Statute 847.014 is clearly overbroad. As it now stands, any production dealing with adolescent sex, whether it be a play, a motion picture or scientific text, regardless of its literary, artistic, political or scientific value, comes within the clutches of this defective law. If a book contained a single picture or illustration of an adolescent touching the clothed genital area of another child, it faces prosecution. Furthermore, a Broadway play showing the spanking of a fifteen year old girl, or a nudist magazine exhibiting a young person's genitals or a medical text with illustrations of a child masturbating, would all come under the purview of this diseased law.

A literal application of this unbridled legislation would endanger such works as sociological or anthropological documentary films or publications depicting becoming of age, rituals and treatises portraying children engaged in so called "sexual conduct" as well as other culturally indispensable and acceptable forms of expression.

It would be hard to find a more classic example of overbreadth in a statute. No matter how Florida Statute 847.014 is viewed, or construed, it prohibits distribution of all forms of expression of sexual conduct by a person under eighteen years of age. Prior to Leonard Campagno being charged there has been no authoritative construction of Florida Statute 847.014 that would in any way amplify this so called anti-obscenity statute which is found in the chapter of the Florida Statutes specifically dealing with obscene literature. *Ward v. Illinois*, 431 U.S. 767 97 S.Ct. 2085 (1977).

This Court in *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972), sets forth the reasons that vague statutes are unconstitutional:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms", it "operates to inhibit the exercise of (those) freedoms."
>
> Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked. *Grayned v. City of Rockford* at 104.

In addition, statutes which infringe on the area of expression must be drafted with a greater degree of specificity than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242 (1974).

Subsection (c) as set forth above defines "Sexual conduct". Said definition although including two specific sexual acts of masturbation and sexual intercourse then proceeds to include the mere physical conduct with a person's clothed pubic area or the female breast or *any conduct which suggests that a crime is being or will be committed.* The extension of such a definition of "Sexual conduct" goes beyond the requirement of same and is included to scenes which might suggest that such a crime is being or will be committed. This would likewise include the use of a minor in any insignificant role of the film, photograph, show, book, etc., in which a rape is depicted or referred to. Needless to say the famous Greek classics would surely fall subject to the prohibitions of this particular statute.

Possibly being even more removed from the restrictions sought to be imposed by *Miller v. California, supra,* pertaining to specific sexual conduct would be that involving the definition of "sadomasochistic abuse". Again said definition being incorporated in Section (2)(a)1 and (2)(a)2. According to said definition, especially in light of the fact that specific sexual conduct need not be present, it would be a violation of Section (2)(a)1 and (2)(a)2 to show in a major motion picture film, book, magazine, etc., a teacher spanking a child in a classroom with his pants pulled down or even as in the "Hunchback of Notre Dame" the flagellation of the hunchback in his particular bizarre costume by the masked executioner.

It must be stressed that for violations of (2)(a)1 and (2)(a)2 to occur, there need not be the required sexual conduct as mandated by *Miller* to be present. Therefore, the mere occurring of those "sexual conduct", "sexual excitement", or "sadomasochistic abuse" involving

a minor, that in and of itself constitutes a violation. The test of "obscenity" as set forth under section (f) need not be present.

Furthermore, both statutes prohibit a presentation which "in whole or *in part*" depict these various acts. As mandated by *Miller* and *Roth*, *supra*, materials must be considered in their entirety, i.e., in a whole, and material cannot be proscribed by an isolated scene which would depict one of those three acts previously mentioned. For example, a two-hour motion picture film which depicts a small child being punished by a spanking will fall even if that constituted only a thirty-second segment of said film. Again, the different variations are so numerous and, as such, clearly are violative of the First Amendment to the United States Constitution.

It is interesting to note that the Florida Supreme Court's interpretation of said statute in the *Griffin* (*supra*), opinion included that the defendant who was charged therein with producing and directing *obscene photos* involving a minor and procuring a minor for *obscene photos* did not have standing to attack the constitutionality of the statute as said statute proscribed *conduct* not constitutionally protected speech or activities. Said opinion is clearly contrary to the most recent opinion in *Ferber*, *supra*. The Court specifically notes in *Ferber* at 526:

> The severe penalties imposed by Section 263.15 of the penal law reserved for those who promote plays, films, books and photographs, dealing with adolescent sex in a non obscene manner. Thus to the extent that Section 263.15 is designed to protect child employees from engaging in

acts which the legislature has found to be dangerous to their well being. The statute is "strikingly under inclusive (*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214, 95 S.Ct. 2268, 2275 45 L.Ed.2d 125).

In short the statute discriminates against films and other visual portrayals of non obscene adolescent sex solely on the basis of their context and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal the statute cannot be sustained.

Since this Court first chartered this general course of law dealing with the subject of obscenity, it has never wandered from the formula requiring laws to include the test of obscenity. Thus, an analysis of the authorities set forth herein leads to the inescapable conclusion that Florida Statute 847.014, which clearly regulates what adults may read or see, must contain the obscenity test. Furthermore the vague language of said statute fails to put an individual of common intelligence on notice as to what is or is not prohibited under said statute.

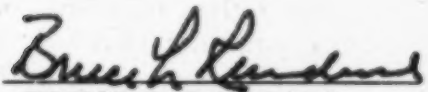
For these reasons Florida Statute 847.014 is unconstitutional and unavailable to prosecute and convict Leonard Campagno and sentence him to fifteen years incarceration in the State prison.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the judgment and order of the Fourth District Court of Appeal.

Respectfully submitted,

BRUCE L. RANDALL
4901 N. Federal Highway
Suite 480
Fort Lauderdale, Florida 33308

By 
BRUCE L. RANDALL
Attorney for Petitioner
(305) 491-1510

Of Counsel:

YALE T. FREEMAN
200 S.E. First Street
Suite 1101
Miami, Florida 33131

Appendix

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1981

LEONARD JOSEPH CAMPAGNO
a/k/a LENNY CAMP,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 79-1886.

Decision filed July 1, 1981

Appeal from the Circuit Court for Broward County; Joseph E. Price, Judge.

Rudy Sorondo and Yale T. Freeman, Miami, for appellant.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS, C.J., MOORE and HERSEY, JJ., concur.

IN THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LEONARD JOSEPH CAMPAGNO
a/k/a LENNY CAMP

Appellant,

v.

STATE OF FLORIDA

Appellee.

CASE NO. 79-1886

July 29, 1981

BY ORDER OF THE COURT:

ORDERED that the Petition for Rehearing filed by Appellant on July 14, 1981 is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
CLYDE L. HEATH,
CLERK

cc: Yale T. Freeman, Esq.
Attorney General

APPENDIX C

CONSTITUTIONAL and STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or the press . . . ."

2. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

3. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

STATE STATUTES

The pertinent provisions of Florida Statute 847.014, read as follows:

> (2)(a)(1). It is unlawful for any person knowingly to produce, conduct, direct, perform, or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a minor.
>
> (2)(a)(2). It is unlawful for any person knowingly to aid, abet, counsel, hire, or otherwise procure a minor to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct,

The pertinent provisions of Florida Statute 847.014(1), read as follows:

> (c) "Sexual conduct" means acts of masturbation; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be female, breast or any act or conduct which constitutes the commission of sexual battery or suggests that such crime is being or will be committed.
>
> (d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means the flagellation or torture by or upon a person clad in undergarments, a mask, or a bizarre costume or the condition of being fetterred, bound, or otherwise physically restrained on the part of one so clothed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 and Joy B. Shearer, Assistant Attorney General, Palm Beach County Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 25 day of September, 1981.

BRUCE L. RANDALL
4901 N. Federal Highway
Suite 480
Fort Lauderdale, Florida 33308

By Bruce L. Randall
BRUCE L. RANDALL

Opposition

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NO. 81-604

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1981

LEONARD JOSEPH CAMPAGNO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

JIM SMITH
Attorney General
Tallahassee, Florida

JOY B. SHEARER
Assistant Attorney General
111 - Georgia Avenue, R 204
Elisha Newton Dimick Bldg.
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

QUESTION PRESENTED

WHETHER THE PETITIONER HAS ESTABLISHED THAT THIS COURT SHOULD ASSUME JURISDICTION OVER THE INSTANT CASE ON THE GROUND THAT FLA.STAT.847.014 IS UNCONSTITUTIONAL?

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STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the Case subject to the following clarifications and additions:

The Respondent does not accept the Petitioner's statement that the minor involved had represented her age as eighteen. The minor testified she had filled out an application for a modeling job and stated thereon that her age was seventeen. The application was given to the Petitioner (Appendix A).

The information charged the Petitioner in Count I with producing photographs of the minor which depicted sexual conduct, sexual excitment, or sadomasochistic abuse involving said

minor to-wit: acts of analingus, cunnilingus, and physical contact with the breast, contrary to Fla.Stat. 847.014(2)(a)(1). Count II charged that the Petitioner had procured the minor to perform in these photographs (Appendix B). The proof at trial amply supported the charges (Appendix C).

The appeal in the Court below was stayed until the Florida Supreme Court ruled on the constitutionality of the statute in the then-pending case of Griffin v. State, which is reported at 396 So. 2d 152 (Fla. 1981) (Appendix B). Subsequent to the rendition of the Griffin opinion, oral argument was had in the instant case

and the Court of Appeal affirmed the Petitioner's conviction in a per curiam decision. (Petitioner's Appendix A).

ARGUMENT AGAINST GRANTING THE WRIT

FLORIDA STATUTE SECTION 847.014, WHICH REGULATES THE PRODUCTION OF PORNOGRAPHIC MATERIAL INVOLVING MINORS, IS CONSTITUTIONAL; ACCORDINGLY, THE COURT OF APPEAL DID NOT ERR OR CREATE CONFLICT IN THE LAW IN AFFIRMING THE PETITIONER'S CONVICTIONS THEREUNDER.

The Petitioner's attack on Fla. Stat. Section 847.014 as violative of the First Amendment is misdirected, for the statute does not regulate speech but rather the production and procurement of child pornography. Thus, it is conduct which is the focus of the statute, an area in which the State has a greater power to regulate. Miller v. California, 413 U.S. 15,26 (1973).

This Court has recognized that a State has the power to enact legislation to control the types of communicative material available to minors in a more stringent manner than that available to adults. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Ginsberg v. New York, 390 U.S. 629 (1968). The statute under which Petitioner was convicted in the case sub judice is aimed at the protection of minors and not at the control of speech; it is the harm to a minor involved in the production of sexually explicit materials that is the focus of the Statute. The statute was so construed by the Florida Supreme Court in Griffin v. State, 396 So. 2d 152

(Fla. 1981). In that decision, the Court held the statute is constitutional and need not incorporate the Miller v. California, 413 U.S. 15 (1973), test of obscenity.

This statute is also distinguishable from the provisions found unconstitutional in Graham v. Hill, 444 F. Supp 584 (W.D. Tex 1978) and People v. Ferber, 52 N.Y. 674, 422 N.E. 2d 523 (Ct.App. 1981),cited by the Petitioner. In those cases, the statutes were directed against dissemination and were held overbroad as infringing on First Amendment rights. The Florida statute, which only deals with the production aspects of child pornography, is not violative of the First Amendment. In

fact, the District Court in Graham v. Hill, supra, specifically noted the distinction between dissemination and production:

> If the statute were limited to prohibiting the depiction of minors actually engaging in sexual conduct, or even if the statute merely prohibited the observance of actual sexual conduct by minors, the Court would likely have no hesitation in declaring its constitutionality.

Id. at 592.

Furthermore, in the instant case, as in Griffin v. State, 396 So. 2d 152 (Fla. 1981), the Petitioner has no standing to challenge the statute on overbreadth grounds because the statute was not unconstitutionally applied to his conduct, which he has never seriously argued was innocent. The examples

cited in his brief, such as a picture of a teacher spanking a child in class, are hypothetical. The Petitioner's conduct was procuring minors to be in and producing photographs of minors engaged in sexual and exhibitionistic acts. This clearly fell within the statute's parameters. See, Fla.Stat. 847.014(2)(a)(1) and (2)(a)(2). Since the statute proscribes conduct and not constitutionally protected speech, the Petitioner does not have standing to attack the statute as it has not been unconstitutionally applied to him. Broadrick v. Oklahoma, 413 U.S. 601,611 (1973); Griffin v. State, Supra, at 155-156.

Likewise, the statute is not void for vagueness. Subsection (1) of

Section 847.014 sets forth definitions of the terms "sexual conduct", "sexual excitment", and "sadomasochistic abuse". Subsection (2)(a)(1) and (2) refers to these definitions in stating that such materials may not be knowingly produced involving a minor and that it is unlawful to procure a minor to participate in such material. The statutory language thus conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, so it is not unconstitutionally vague. Griffin v. State, Supra, at 154.

Therefore, the Court of Appeal did not err in affirming the Petitioner's convictions for violating Fla.

Stat. 847.014(2)(a)(1) and (2). The statute's constitutionality was upheld by the State Supreme Court in Griffin v. State, Supra, and the Court of Appeal's decision in this case was consistent with Griffin. The per curiam affirmance of the convictions likewise was consistent with the decisions of this Court which recognized the State's valid interest in the protection of the welfare of children. Therefore, the Petitioner has failed to establish grounds for this Court to exercise its certiorari jurisdiction to review his convictions.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court DENY the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

JOY B. SHEARER
Assistant Attorney General
Elisha Newton Dimick Building
111 - Georgia Avenue, R--204
West Papm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been furnished this __ day of December, 1981, to Bruce L. Randall, Esq., Counsel for Petitioner, 4901 N. Federal Highway, Suite 480, Fort Lauderdale, FL 33308; and to Yale T. Freeman, Esq., 200 S.E. First Street, Suite 1101, Miami, Florida 32131.

Of Counsel

APPENDIX

APPENDIX "A"

EXCERPT FROM THE TESTIMONY OF THE SUBJECT MINOR

Q. Do you recall what you did at Infinity Studio on the first occasion, if anything?

A. I filled out an application.

Q. Now, that was an application for what?

A. For employment.

Q. Where did you get that application form from?

A. From Lenny Camp.

Q. Do you recall what kind of questions were on that application?

A. Name, date, age.

Q. Do you recall answering those questions?

A. Yes.

Q. And do you recall what answers you put on the questionnaire with regard to your age?

A. My true age.

Q. What age was that?

A. Seventeen.

Q. What did you do with that application form after you filled it out?

A. I gave it to Lenny Camp.

Q. When did you give it to him?

A. After I filled it out.

APPENDIX "B"

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRUCIT IN AND FOR BROWARD COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

LEONARD JOSEPH CAMPAGNO
a/k/a
LENNY CAMP

INFORMATION FOR

I. and II. MINORS PARTICIPATING IN HARMFUL EXHIBITIONS

III. CONTRIBUTING TO DELINQUINCY OF A MINOR (Misdemeanor)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

COUNT I

MICHAEL J. SATZ of the 17th Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that

LEONARD JOSEPH CAMPAGNO a/k/a LENNY CAMP

on or about the 28th day of February, A.D. 1978, in the County and State aforesaid.
knowingly produce, conduct, direct, perform, or participate in any photograph, motion picture, exhibition, show, representation or other presentation, to-wit: photographs, of Zara Spaltan, a person under the age of eighteen (18) years, which, in whole or in part, depict sexual conduct, sexual excitment, or sadomasochistic abuse involving said minor, to-wit: acts of analingus, cunnilingus, and physical contact with the breast, contrary to F.S. 847.014(2)(a)(1),

COUNT II

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Cirucit of Florida, as prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that LEONARD JOSEPH CAMPAGNO a/k/a LENNY CAMP on or about the 28th day of February, A.D. 1978, in the County and State aforesaid, did then and there knowingly aid, abet, counsel, hire or otherwise procure a minor, to-wit: Zara Spaltan, a person under the age of eighteen (18) years, to perform or participate in photographs which depict sexual excitment or sadomasochistic

COUNT III

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Cirucit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that LEONARD JOSEPH CAMPAGNO a/k/a LENNY CAMP on or about the 28th day of February, A.D., 1978, in the County and State aforesaid, did then and there commit an act, to-wit: photographing a minor, to-wit: Zara Spaltan,a person under the age of eighteen (18) years, in acts of sexual conduct, sexual excitment, or sadomasochistic abuse which caused or encouraged a person under the age of eighteen (18), to-wit: Zara Spaltan to become a delinquent or dependent child as defined in Chapter 39, Florida Statutes, contrary to F.S. 827.04(3)_

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APPENDIX "C"

EXCERPTS FROM THE TESTIMONY
OF THE SUBJECT MINOR

Q. All right. Now, what happened once you entered that penthouse apartment?

A. We were asked to model nude.

Q. Who asked you to model nude?

A. Lenny Camp.

Q. What did you say about that?

A. We disagreed.

Q. You said you didn't want to do that?

A. Yes.

Q. Did you tell him that, or were you just thinking that?

A. No, we told him that.

Q. What, if anything, did the Defendant say when you told him you didn't want to do that?

A. Like, if you didn't, you know, you wouldn't be too much of a model. Think things about modeling career and things to that manner.

Q. Was a modeling career something important to you?

A. Very much so at the time.

Q. Did you finally agree to model in the nude?

A. Yes.

Q. Did the other girls as well?

A. Yes.

Q. And where were these photographs taken, if any photographs were taken?

A. In a tub in the bedroom. In the living room.

Q. Do you recall the taking of those photographs, both in the bedroom and in the tub?

A. Yes.

Q. Who was present with you when the photographs were taken in the bedroom?

A. Lenny Camp. Peri, Joanne and Harold.

Q. Zara, who was present with you when the photographs were taken in the tub?

A. Lenny Camp. myself, Peri, Joanne and Harold.

. . . . .

Q. (By Mr. Vinikoor) Zara, do you recall what was depicted on the two photographs that are now in the possession of the clerk?

A. Yes.

Q. Would you tell the jury, please, what you were doing and what Joanne was doing when those photographs were taken?

A. Licking her breasts.

Q. Were those photographs posed or were they unposed?

A. There were posed.

Q. And who, if anyone, instructed you to do this?

A. Lenny Camp.

. . . . .

A. It looks like Joanne has got her face in my vagina.

Q. Do you recall that happening?

A. Yes.

Q. I would like you not to say what it looks like, but tell the Court only what you remember. Do you remember that happening?

A. I'm pretty sure, yes.

Q. Do you remember if that just happened or if you were told by anyone to do that?

A. We were told.

Q. Who told you?

A. Lenny Camp.

. . . . .

Q. (By Mr. Vinikoor) Zara, what were Peri and Joanne doing at

the time that photograph was taken, if you know?

A. It looks like they were kissing.

Q. What, if anything, were you doing at the time that that photograph was taken?

A. Putting my tongue on her butt.

Q. And who is "her"? Who are you referring to as her?

A. Joanne.

Q. Why were you doing that, Zara?

A. We were told to pose that way.

Q. Who told you to do that?

A. Lenny Camp.

. . . . .

APPENDIX "D"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

LEONARD JOSEPH CAMPAGNO, a/k/a LENNY CAMP, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 79-1886

February 27, 1980

BY ORDER OF THE COURT:

. . . . .

ORDERED that Appellee's February 15, 1980, Motion to Stay is granted, and these proceedings are stayed pending Supreme Court of Florida's decision in Griffin v. State, Case No. 56,240.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: Yale T. Freeman, Esq.
Attorney General
Hon. R. E. Lockwood, Clerk(78-3950)

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